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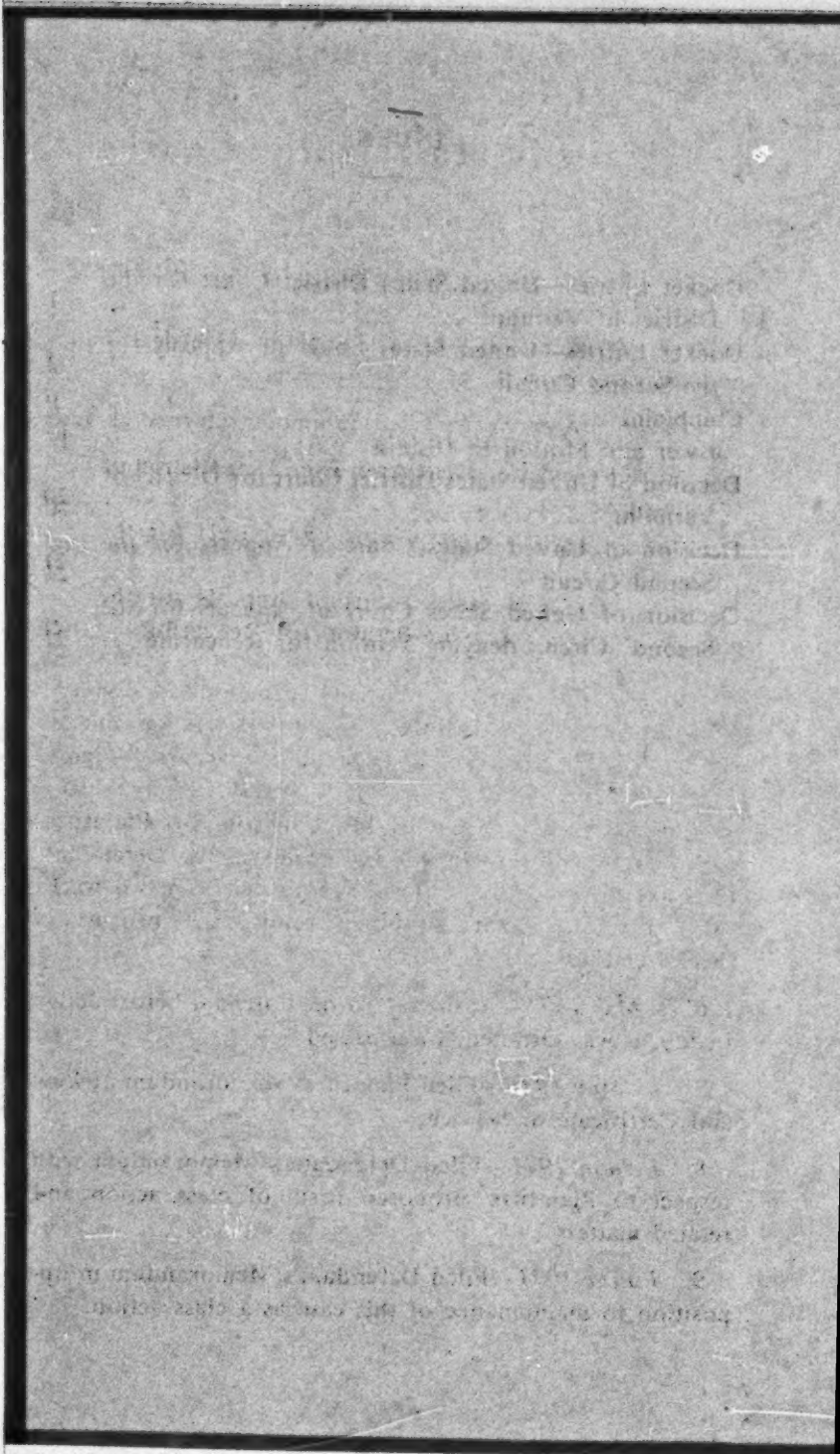

United States District Court

District of Vermont

Docket Entries.

1. *9 February 1971*—Filed Complaint. Issued summons and delivered same to Marshall for service.

2. *12 February 1971*—Filed Summons returned served.

3. *3 March 1971*—Filed Answer of Defendant and Certificate of Service.

4. *31 March 1971*—Filed Plaintiff's request for pre-trial conference.

5. *29 April 1971*—In Chambers, Pre-Trial Conference before Judge Leddy and hearing on affirmative defenses in Defendant's Answer. Peter Langrock, Esq. and Mark Sperry, Esq. for Plaintiffs; Henry Black, Esq. for Defendant (out-of-state attorneys present for Defendant; Taggart Whipple, Esq., Richard Nolan, Esq., and Frank Ferony, Esq.). Statements made to Court by Mr. Langrock for Plaintiffs, followed by Mr. Black and Mr. Whipple for Defendant. Decision reserved. Plaintiffs to submit briefs in two weeks (May 13); Defendant to submit reply brief two weeks thereafter (May 27).

6. *4 May 1971*—At the call of the Calendar before Judge Leddy, it was Ordered; Case passed.

7. *13 May 1971*—Filed Plaintiffs' Memorandum of Law and Certificate of Service.

8. *1 June 1971*—Filed Defendant's Memorandum with respect to Plaintiffs' proposed form of class action and related matters.

9. *1 June 1971*—Filed Defendant's Memorandum in opposition to maintenance of this case as a class action.

Docket Entries.

10. *30 September 1971*—Filed Letter dated June 16, 1971, from Taggart Whipple.

11. *30 September 1971*—Filed Opinion and Order—It Is Ordered that reference to all persons other than the four named plaintiffs is stricken from the complaint and that this action will not be permitted to proceed as a class action. Copy mailed to attorneys.

12. *12 October 1971*—Filed Plaintiffs' Motion to Modify order and certify question of Law to Court of Appeals and Certificate of Service.

13. *14 October 1971*—In Chambers before Judge Leddy, Peter Langrock, Esq., for Plaintiffs. Henry Black, Esq., Roger Pyle, Esq., Paul Carroll, Esq., and Richard E. Nolan, Esq., for Defendant. Hearing on Plaintiffs' Motion to modify Order and certify question of law to Court of Appeals. Statements made to Court by Mr. Nolan, followed by Mr. Langrock. ORDERED: Plaintiffs may have until Monday, October 18, 1971, to file brief and Defendant until Monday, October 18, 1971, to file reply brief. Decision reserved.

14. *15 October 1971*—Filed Defendant's memorandum in opposition to Plaintiffs' Motion to modify order and certify question of law to Court of Appeals.

15. *18 October 1971*—Filed Plaintiff's Memorandum of Law and Certificate of Service.

16. *20 October 1971*—Filed Defendant's letter dated October 18, 1971.

17. *21 October 1971*—Filed Amendment to Opinion and Order—Plaintiffs' Motion is granted. Amendment shall be an addition to and an intergral part of the Opinion and Or-

der in the above case filed September 30, 1971. Mailed copy to attorneys.

18. *22 October 1971*—Filed Defendant's Reply Memorandum with respect to Plaintiffs' Motion for Certification.

19. *1 November 1971*—Filed Plaintiffs' Notice of Appeal, Copy mailed to Langrock & Sperry, Esqs., Black & Plante, Esqs. & Davis, Polk & Wardwell, Esqs.

20. *9 December 1971*—Mailed record on Appeal to Clerk, U. S. Court of Appeals for the Second Circuit, New York, N. Y. Attorneys notified.

Docket Entries.

UNITED STATES COURT OF APPEALS

For the Second Circuit

1. *1 November 1971*—Filed petition for leave to appeal with proof of service.

2. *10 November 1971*—Filed order denying leave to appeal under 1292 (b).

3. *22 November 1971*—Filed motion for reconsideration of application for leave to appeal with proof of service.

4. *22 November 1971*—Filed motion for leave to file additional documents with proof of service.

5. *22 November 1971*—Filed copy of notice of appeal.

6. *24 November 1971*—Filed memorandum in opposition to motion to reconsider, etc. with proof of service.

Docket Entries.

7. *30 November 1971*—Filed order granting motion for leave to file additional documents in support of motion for leave to appeal.

8. *30 November 1971*—Filed order granting motion to reconsider and vacate order dated 10-10-71 denying petition for leave to appeal and to grant leave to appeal.

9. *10 December 1971*—Received record (original papers of district court).

10. *16 December 1971*—Filed record (original papers of district court).

11. *17 January 1972*—Filed motion for extension of time to file appellant's brief and appendix with proof of service.

12. *18 January 1972*—Filed order granting motion for extension of time to file appellant's brief and joint appendix to 2-8-72.

13. *4 February 1972*—Filed order extending time to file appellant's brief and joint appendix to 3-6-72.

14. *23 March 1972*—Filed stipulation and order (endorsed) extending time to file appellant brief and joint appendix to 3-10-72; appellee's time is extended to 4-24-72.

15. *24 March 1972*—Filed appendix.

16. *24 March 1972*—Filed brief, appellant with proof of service.

17. *24 April 1972*—Filed brief, appellee with proof of service.

18. *24 May 1972*—Filed stipulation and order (endorsed) application for adjournment of argument is denied; argument of appeal will be heard at Bridgeport during week of 6-26-72.

Docket Entries.

19. *28 June 1972*—Argument heard (by: Moore, Smith, Timbers CJJ).

20. *7 September 1972*—Judgment affirmed, Smith, CJ.

21. *7 September 1972*—Dissenting in separate opinion, Timbers, CJ.

22. *7 September 1972*—Filed judgment.

23. *20 September 1972*—Filed petition for rehearing and rehearing in banc with proof of service.

24. *20 September 1972*—Filed itemized and verified bill of costs with proof of service.

25. *18 October 1972*—Filed order denying petition for rehearing.

26. *18 October 1972*—Filed order denying petition for rehearing in banc, Kaufman, CJ.

27. *18 October 1972*—Concurring in separate opinion, Mansfield and Mulligan, CJJ.

28. *18 October 1972*—Concurring with Judge Mansfield in separate opinion, Kaufman & Mulligan.

29. *18 October 1972*—Dissenting in separate opinion, Timbers, CJ.

30. *30 November 1972*—Filed motion to stay the issuance of the mandate pursuant to 41 (b) with proof of service.

31. *18 December 1972*—Filed order granting motion to stay the issuance of the mandate pursuant to 41 (b).

32. *21 December 1972*—Filed notice of filing of petition for writ of certiorari (S. C. 72-888).

33. *26 February 1973*—Filed certified copy of order of Supreme Court granting petition for writ of certiorari.

Complaint

UNITED STATES DISTRICT COURT

District of Vermont

H. KEITH ZAHN and VALERIE ZAHN, CHARLES LEAZER and MARION L. LEAZER, individually, on behalf of themselves and on behalf of all similarly situated Plaintiffs,

v.

INTERNATIONAL PAPER COMPANY.

Docket No. 6192

NOW COME H. Keith Zahn and Valerie Zahn, and Charles Leazer and Marion L. Leazer, individually, on behalf of themselves and on behalf of all similarly situated Plaintiffs, and complain as follows:

COUNT I.

1. Plaintiffs are citizens of the State of Vermont, and the Defendant is a corporation organized under the laws of the State of New York and has its principal place of business in the State of New York. The matter in controversy, exclusive

of interest and costs, as to each of the named Plaintiffs, exceeds the sum of $10,000.00. Jurisdiction is founded on 28 U. S. C. A. 1332 (a).

2. Plaintiffs bring this action on behalf of themselves and, under Federal Civil Procedure Rule 23, on behalf of all other Lake Champlain lakeshore landowners and lakeshore lessees similarly situated and located in the Towns of Orwell, Shoreham and Bridport, County of Addison, State of Vermont; the said lakeshore landowners and lakeshore lessees in the Towns of Orwell, Shoreham and Bridport number approximately two hundred (200), and it is therefore impracticable to bring them all before Court.

3. There are questions of law and fact common to the entire class of lakeshore landowners and lakeshore lessees similarly situated and located in Orwell, Shoreham and Bridport; the claims of the Plaintiffs herein are typical of the claims of the said class; and the Plaintiffs will fairly and adequately protect the interests of and represent said class; the common questions of law and fact predominate over any questions affecting only individual members, and a class action is superior to other available methods for the fair and efficient adjudication of this controversy.

4. The Plaintiffs, H. Keith Zahn and Valerie Zahn, are the owners of certain lands and premises having lake frontage on the easterly edge of Lake Champlain in the Town of Orwell, Vermont, namely, all and the same lands and premises conveyed to the Plaintiffs Zahn by Warranty Deed of Harry W. Holden and Elinor S. Holden, dated 19 July 1963, and recorded in Book 29, Page 126, of the Orwell Land Records, said lands including over one-half mile of lakeshore frontage.

5. The Plaintiffs, Charles Leazer and Marion L. Leazer, are the owners of certain lands and premises having lake frontage on the easterly edge of Lake Champlain in the Town of Orwell, Vermont, being all and the same lands and premises conveyed to the Plaintiffs Leazer by Deed of Manfred Ehrich, dated 16 October 1967 and recorded in Book 31, Page 220 of the Orwell Land Records, said lands and premises including over 1,800 feet of lakeshore frontage.

6. At all material times, the Defendant, International Paper Company, operates and has operated a pulp and paper making plant in the Village of Ticonderoga, New York, adjacent to Ticonderoga Creek, which flows from Lake George, in the State of New York, to Lake Champlain.

7. At all material times, the Defendant, International Paper Company, has discharged pulp and paper making waste, and untreated and inadequately treated domestic or sanitary sewage into Ticonderoga Creek approximately two miles from its entry into Lake Champlain.

8. At all material times, the Defendant's pulp and paper making waste has been discharged on a daily basis in volumes of approximately fifteen million gallons per day, and said waste consists of organically active, oxygen consuming material, both in suspension and solution, and other waste materials.

9. At all material times, the Defendant's untreated and inadequately treated domestic or sanitary waste has been discharged on a daily basis, and said discharge consists of the waste from approximately 1,100 employees, in the amount of approximately 33,000 gallons per day.

10. The above mentioned pulp and paper making waste and domestic or sanitary waste at all material times has ex-

ceeded and exceeds the capacity of Ticonderoga Creek and of Lake Champlain to assimilate them, and as a proximate result, these wastes are transported naturally by the Creek and by Lake Champlain in, on and through the waters of Lake Champlain, affecting the Plaintiffs' properties and the properties of the other members of the class as hereafter set forth.

11. As a proximate result of the above mentioned discharges of the Defendant, the Defendant has caused a massive sludge blanket or bed, consisting of approximately 1,430,000 cubic yards, to form in Ticonderoga Creek and in the bottom of Lake Champlain, said sludge bed or blanket on the bottom of Lake Champlain consisting of approximately 300 acres, or 802,000 cubic yards, to depths of up to 12 feet; and said sludge blanket or bed consists of woodchips, cinders, and other organic waste material in a state of decay. As a proximate result of the formation and existence of the above mentioned sludge bed or blanket, the Plaintiffs' properties and the properties of the other members of the class have been affected as hereafter set forth.

12. As a proximate result of the Defendant's actions in forming the aforementioned sludge blanket, large masses of sludge have broken from the sludge bed and have been carried across Lake Champlain and deposited on the Plaintiffs' shorefront properties, and on the properties of the other members of the class.

13. Said blankets or masses of sludge deposited on the Plaintiffs' lands and the lands of other members of the class are foul, unhealthy, smelly, and aesthetically unpleasing.

14. As a proximate result of the Defendant's actions in forming the above mentioned sludge bed, large blankets or masses of sludge have broken from the sludge bed and have

been carried across Lake Champlain, and have at all material times, floated and become situated on the waters adjacent to the Plaintiffs' properties and the properties of the other members of the class. Said floating masses of sludge have been and are unhealthy, smelly, and aesthetically unpleasing and have caused the waters in, around, and adjacent to the Plaintiffs' properties and the properties of the other members of the class to become foul, unhealthy, smelly, and aesthetically unpleasing.

15. As a proximate result of the discharges of the Defendant, the waters of Lake Champlain in, around, and adjacent to the Plaintiffs' lakefront properties, and the lakefront properties of the other members of the class, have been and are severely polluted, foul, smelly, unhealthy, and aesthetically unpleasing.

16. As a proximate result of the discharges of the Defendant, the waters of Lake Champlain in, around, and adjacent to the Plaintiffs' properties, and the properties of the other members of the class, have been made unfit for and are unfit for any reasonable recreational uses, including fishing, swimming, boating, water skiing, and general bathing.

17. As a proximate result of the above discharges of the Defendant, the waters of Lake Champlain in, around, about and adjacent to the Plaintiffs' properties and the properties of the other members of the class have been made unfit for drinking, recreation, or any other reasonable use.

18. As a proximate result of the discharges of the Defendant, the waters of Lake Champlain in, about, around and adjacent to the Plaintiffs' properties and the properties of the other members of the class have been degraded below the water quality standards set forth by the Vermont Department of Water Resources and below the water quality stand-

ards set forth under the statutes and regulations of the United States.

19. The aforesaid actions of the Defendant are willful, intentional, unreasonable, and in disregard of the rights of the Plaintiffs and other members of the class.

20. As a proximate result of the discharges of the Defendant, and the pollution of the waters of Lake Champlain as aforesaid, the Plaintiffs and the other members of the class have been unable to utilize their lakeshore properties, and the waters of Lake Champlain in and around and adjacent thereto, for drinking water, fishing, bathing, boating, swimming, and other recreational uses and other reasonable uses. The Plaintiffs and other members of the class have experienced a loss of enjoyment of their lakeshore properties as a result of their inability to use them for recreational uses or other reasonable uses. The Plaintiffs and other members of the class have further suffered a dimunition in the rental value of their lakeshore lands as a proximate result of the pollution and other acts of the Defendant above referred to.

21. As a proximate result of the depositing of floating portions of the sludge bed on their properties as aforesaid, the Plaintiffs and other members of the class have been unable to utilize their lakeshore properties, and the waters of Lake Champlain in and around and adjacent thereto, for drinking water, fishing, bathing, boating, swimming, and other recreational uses, and other reasonable uses. The Plaintiffs and other members of the class have experienced a loss of enjoyment of their Lakeshore properties as a result of their inability to use them for recreational uses or other reasonable uses. The Plaintiffs and other members of the class have further suffered a diminution in the rental value of their lakeshore lands as a proximate result of the pollution and other acts of the Defendant above referred to.

WHEREFORE, the Plaintiffs, individually, and on behalf of the other members of the class, demand judgment against the Defendant in the amount of Ten Million and 00/100 Dollars—($10,000,000.00), for the recovery of which, together with interest and just costs, they bring this suit; and the Plaintiffs further pray that this matter be tried by jury.

COUNT II.

1. The Plaintiffs allege and incorporate herein as though specifically set forth Paragraphs 1 through 19 of COUNT I of the Complaint.

2. As a proximate result of the discharges of the Defendant, the aforementioned sludge bed at the mouth of Ticonderoga Creek and in Lake Champlain will continue to be organically active, will continue to degrade the water quality of the waters of Lake Champlain and pollute the waters of Lake Champlain in, around, and adjacent to the lakeshore properties of the Plaintiffs and other members of the class.

3. As a proximate result of the discharges of the Defendant, portions of the above mentioned sludge bed lying at the mouth of Ticonderoga Creek and in the waters of Lake Champlain will continue to break off and be carried across Lake Champlain to be deposited on the Plaintiffs' properties and the properties of other members of the class.

4. As a proximate result of the discharges of the Defendant, portions of the aforementioned sludge bed will continue to break off in the future and will continue to be carried across Lake Champlain and will continue to float in the waters in, around, and adjacent to the Plaintiffs' lakeshore properties and the lakeshore properties of the other members of the class.

5. As a proximate result of the discharges of the Defendant, the Plaintiffs and other members of the class have been deprived of and will continue to lose the recreational uses of their lakeshore properties, including fishing, swimming, bathing and boating, and they have lost and will continue to be deprived of other reasonable uses of said waters.

6. As a proximate result of the discharges of the Defendant, the fair market value of the Plaintiffs' lakeshore frontage properties and the lakeshore frontage properties of the other members of the class has been diminished and reduced below the value of comparable properties on Lake Champlain and below the values which such lakeshore frontage properties would have were the waters of Lake Champlain adjacent thereto not polluted, foul, unappealing, unhealthy, and aesthetically unpleasing.

WHEREFORE, the Plaintiffs, on behalf of themselves and other members of the class, demand judgment against the Defendant in the amount of Ten Million and 00/100 Dollars—($10,000,000.00); and the Plaintiffs further pray that this matter be tried by jury.

COUNT III.

1. Plaintiffs allege and incorporate herein as though specifically set forth Paragraphs 1 through 19 of COUNT I of the Complaint.

2. The Plaintiffs and other members of the class are riparian owners along the easterly shores of Lake Champlain.

3. That the uses of the waters of Lake Champlain by the Defendant as aforesaid are unreasonable and in violation of

the rights of the Plaintiffs and the other members of the class to the use of said waters as riparian owners.

4. The Defendant as a proximate result of the above actions has damaged and permanently reduced the value of the riparian rights of the Plaintiffs and the other members of the class in that the Defendant has impaired the recreational value of the waters of Lake Champlain in, around and adjacent to the lakeshore properties of the Plaintiffs and the other members of the class, and in that the Defendant has so polluted the said waters that they are unfit for any reasonable use.

WHEREFORE, the Plaintiffs, on behalf of themselves and other members of the class, demand judgment against the Defendant in the amount of Ten Million and 00/100 Dollars—($10,000,000.00); and the Plaintiffs further pray that this matter be tried by jury.

COUNT IV.

1. Plaintiffs allege and incorporate herein as though specifically set forth Paragraphs 1 through 19 of COUNT I of the Complaint.

2. The Defendant had and has the means at its reasonable disposal of dealing with the waste and pollutants of its plant so as not to affect the interests of the Plaintiffs and the other members of the class, but it failed and continues to fail to do so.

3. The actions of the Defendant as set forth above were undertaken and actuated by evil motives in that they were malicious, wanton, with wicked intention, and the damages to the Plaintiffs and all members of the class were thus maliciously and willfully inflicted.

4. The Plaintiffs and all members of the class because of the malicious, wanton, and wickedly intended acts of the Defendant, are entitled to punitive and exemplary damages.

WHEREFORE, the Plaintiffs in the instant action, on behalf of themselves and all members of the class, pray that they be awarded punitive and exemplary damages in the amount of Ten Million and 00/100 Dollars—($10,000,000.00) and further pray that such sums as are awarded by the Court for said exemplary and punitive damages be set aside for the benefit of encouraging a pollution free environment in the area of Lake Champlain and its tributaries under such terms and conditions as are set forth by this Court; and the Plaintiffs further pray that this matter be tried by jury.

Dated at Middlebury, Vermont, this 9 day of February, 1971.

LANDROCK & SPERRY,
Attorneys for Plaintiffs.
By: /s/ Peter F. Langrock,
A Member of the Firm.

Answer.

(Title omitted in printing.)

Defendant International Paper Company, by its attorneys Black & Plante, for its answer to the complaint herein:

COUNT I.

1. Denies Paragraph 1 except is without knowledge or information sufficient to form a belief as to the truth of the

averments of the first sentence of paragraph 1 and admits that defendant is a corporation organized under the laws of the State of New York with its principal place of business in the State of New York and that plaintiffs purport to bring this action pursuant to 28 U. S. C. 1332 (a).

2. Denies paragraph 2.

3. Denies paragraph 3.

4. Is without knowledge or information sufficient to form a belief as to the truth of the averments of paragraph 4.

5. Is without knowledge or information sufficient to form a belief as to the truth of the averments of paragraph 5.

6. Denies paragraph 6 except admits that until December 1, 1970 defendant operated a pulp mill and paper plant in the Village of Ticonderoga, New York, on which date the pulp mill and certain other units were permanently shut down and defendant intends that all remaining operations at the plant will be permanently shut down in mid-April, 1971, barring unforeseen circumstances, and in any event not later than July 1, 1971.

7. Denies paragraph 7.

8. Denies paragraph 8.

9. Denies paragraph 9.

10. Denies paragraph 10.

11. Denies paragraph 11.

12. Denies paragraph 12.

13. Denies paragraph 13.

14. Denies paragraph 14.

15. Denies paragraph 15.

16. Denies paragraph 16.

17. Denies paragraph 17.

18. Denies paragraph 18.

19. Denies paragraph 19.

20. Denies paragraph 20.

21. Denies paragraph 21.

AFFIRMATIVE DEFENSES.

22. Count I fails to state a claim upon which relief can be granted.

23. The cause of action alleged is barred, in whole or in part, by the applicable Statute of Limitations.

24. Plaintiffs have failed to join as parties defendant persons needed for the just adjudication of this action as required by Rule 19 of the Federal Rules of Civil Procedure.

25. The action is not maintainable as a class action under Rule 23 of the Federal Rules of Civil Procedure.

COUNT II.

1. Defendant repeats and realleges each and every averment set forth in response to paragraphs 1 through 19 of Count I of the complaint herein.

2. Denies paragraph 2.

3. Denies paragraph 3.

4. Denies paragraph 4.

5. Denies paragraph 5.

6. Denies paragraph 6.

AFFIRMATIVE DEFENSES.

7. Count II fails to state a claim upon which relief can be granted.

8. The cause of action alleged is barred, in whole or in part, by the applicable Statute of Limitations.

9. Plaintiffs have failed to join as parties defendant persons needed for the just adjudication of this action as required by Rule 19 of the Federal Rules of Civil Procedure.

10. The action is not maintainable as a class action under Rule 23 of the Federal Rules of Civil Procedure.

COUNT III.

1. Defendant repeats and realleges each and every averment set forth in response to paragraphs 1 through 19 of Count I of the complaint herein.

2. Is without knowledge or information sufficient to form a belief as to the truth of the averments of paragraph 2.

3. Denies paragraph 3.

4. Denies paragraph 4.

AFFIRMATIVE DEFENSES.

5. Count III fails to state a claim upon which relief can be granted.

Answer.

6. The cause of action alleged is barred, in whole or in part, by the applicable Statute of Limitations.

7. Plaintiffs have failed to join as parties defendant persons needed for the just adjudication of this action as required by Rule 19 of the Federal Rules of Civil Procedure.

8. The action is not maintainable as a class action under Rule 23 of the Federal Rules of Civil Procedure.

COUNT IV.

1. Defendant repeats and realleges each and every averment set forth in response to paragraphs 1 through 19 of Count I of the complaint herein.

2. Denies paragraph 2.

3. Denies paragraph 3.

4. Denies paragraph 4.

AFFIRMATIVE DEFENSES.

5. Count IV fails to state a claim upon which relief can be granted.

6. The cause of action alleged is barred, in whole or in part, by the applicable Statute of Limitations.

7. Plaintiffs have failed to join as parties defendant persons needed for the just adjudication of this action as required by Rule 19 of the Federal Rules of Civil Procedure.

8. The action is not maintainable as a class action under Rule 23 of the Federal Rules of Civil Procedure.

Decision of United States District Court for District of Vermont.

WHEREFORE, defendant International Paper Company demands judgment dismissing the complaint herein, together with the costs and disbursements of this action.

Dated at White River Junction, Vermont

March 2, 1971

BLACK & PLANTE,
By: /s/ Henry F. Black,
A Member of the Firm.

DAVIS POLK & WARDWELL,
By: /s/ Taggart Whipple,
A Member of the Firm.

(Certificate of Service omitted in printing.)

Decision of the United States District Court for the District of Vermont can be found in Appendix C at page 40 of the Petition for Writ of Certiorari.

Decision of United States Court of Appeals for the Second Circuit.

Decision of the United States Court of Appeals for the Second Circuit can be found in Appendix A at page 15 of the Petition for Writ of Certiorari.

Decision of the United States Court of Appeals for the Second Circuit denying Petition for Rehearing can be found in Appendix B at page 32 of the Petition for Writ of Certiorari.